IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 526

THE F. & M. SCHAEFER BREWING CO.,

Appellant,

v.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Appellee.

Appeal from Final Order of the New York Court of Appeals

MOTION TO DISMISS APPEAL

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Preliminary Statement

The appellant has appealed from a final order of the Court of Appeals of the State of New York dated June 25, 1958, unanimously affirming an order of the Appellate Division of the Supreme Court of that State.

The opinion of the Court of Appeals is officially reported in 4 N. Y. 2d 423 and is set forth in Appendix A of the appellant's statement as to jurisdiction. The decision of

the Appellate Division is officially reported in 3 App. Div. 2d 898.

By this appeal, the appellant challenges the constitutional validity of the New York City General Business and Financial Tax, as imposed on it for the privilege of carrying on business within the City, to the extent that the tax is measured by appellant's gross receipts from sales to out-of-state customers where the customers took delivery within the City of New York. It contends that the tax, to the extent that it is measured by such receipts, is repugnant to the Commerce Clause.

Appellee moves to dismiss the appeal on the ground that it does not present a substantial federal question.

Statutes and Regulations Involved

The statutes imposing the tax, and the regulations of the Comptroller of the City of New York issued thereunder, are set forth in Appendix B of the appellant's statement as to jurisdiction.

Statement of the Case

This proceeding was brought under the provisions of Article 78 of the Civil Practice Act of the State of New York to annul a determination of the Comptroller of the City of New York assessing additional general business taxes for the period between July 1, 1948 and June 30, 1952, in the total principal amount of $28,019.56.

The determination under review was made as the result of a hearing held by the Comptroller of the City of New York at which evidence was taken. Appellant appeared, and was represented by counsel, at such hearing.

Under the practice in New York the administrative hearing constitutes the trial of the issues in the case (Civil

Practice Act, Article 78). The determination issued in this case as a result of the hearing was first reviewed by the Appellate Division, First Department, which unanimously confirmed it. Upon appeal by appellant to the Court of Appeals of the State of New York that Court unanimously affirmed.

The Appellate Division wrote no opinion. The Court of Appeals wrote an opinion holding the case to be indistinguishable from *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941), and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944).

Facts

I

Appellant is a New York corporation with its principal place of business and brewery at 430 Kent Avenue, Brooklyn, New York (fol. 17). It does a substantial business with customers in the City and State of New York and is admittedly subject to the New York City business tax. The present controversy relates solely to a portion of its sales; to wit, those made to out-of-state distributors where delivery is made at the local brewery (fols. 68-69, 250-263, Txp's Exhs. 1, 20, City's Exh. B).

Appellant sells its beer directly to retailers, as well as to wholesale distributors, which in turn sell to retailers (fols. 91-92). Such distributors are assigned territories by appellant in which they are authorized to sell Schaefer beer, coinciding with the territory granted to the distributor by the state liquor authorities in the state where the distributor is licensed to sell beer (fols. 95, 352-355, 396-397). None of the out-of-state distributors here in question are licensed to sell beer in the State of New York (fols. 246-247, 346-347, 399, 406).

The distributors have no corporate affiliation with appellant, and are not limited to distributing Schaefer beer alone, but distribute the beer of other breweries as well (fols. 232-233, 353). The distributors acquire the beer from appellant by outright purchase, not consignment (fol. 233). Most of the sales to distributors are on open account, terms net, but there are also some C. O. D. sales (fol. 323, Txp's Exh. 24, p. 151).

II

The sales and deliveries to New York State distributors, the receipts from which are admittedly taxable in full, are handled in exactly the same way as the deliveries to the out-of-state distributors here in issue (fols. 68-69, 264-266).

The sales in question were made to distributors in eight states (Pennsylvania, New Jersey and the six New England States) (fols. 532-533). In every case the beer was picked up at appellant's brewery in Brooklyn by vehicles and drivers selected by the distributors (fols. 96, 228-229, 239-241, 475-480). Appellant had nothing to do with selecting the method of transportation (fols. 196, 362, 407-408). The distributors decided what method of transportation to use and the drivers and carriers admittedly represented and acted for the distributors, not for appellant (fols. 239-240, 244-245, 251, 343-344, 363, 388-390).

So far as appellant was concerned its part of the transaction was finished when the truck supplied by the distributor was loaded at the brewery in Brooklyn (fols. 185-186, 198-201). Appellant sent no representative along with the truck, did not reserve title to the beer during transit, and had no control over the beer after delivering it to the truck (fols. 200, 203, 206). Appellant carried no insurance against loss of the beer during transit, all risk of loss being on the distributors or their carriers (fols. 359-362, 392-393).

III

The general practice was for a distributor to put in an order in advance by writing, telegraphing or calling the brewery and setting a date for delivery (fols. 92-93). Appellant's credit department would review the order and, if it was approved, would indicate whether it was to be a cash or credit transaction (fols. 171-175, 324-326, 329, 335-336). The day before the distributor was to call at the brewery and pick up the beer appellant's traffic department would prepare four copies of a document called a "Delivery Ticket and Invoice" (one document) showing, among other things, the number of units of each description ordered by the distributor (fols. 101-104, 176, 186, Txp's Exh. 24, p. 150).

When the distributor's driver arrived at the brewery with his vehicle to pick up the beer, he would show a pick-up order to appellant's dispatcher and receive from that individual all four copies of the aforesaid delivery ticket (fols. 101-103). If appellant's credit department had indicated "C. O. D." on the ticket the driver would make the payment prior to picking up the delivery ticket forms (fols. 321-322, 327-328). In all cases, after receiving the papers the driver would take them to the loading dock or platform at the brewery, where any empty cases were first unloaded, and the full cases of beer were loaded on the truck by appellant's employees (fols. 179-181).

Prior to the loading, the driver of the truck would hand the pick-up order and the four copies of the delivery ticket to one of appellant's employees called a checker (fols. 101-103). The checker supervised the actual loading of the truck, keeping a tally, with the driver, of "exactly what is delivered" (fols. 94, 182-183). When the loading was completed, the checker entered on the delivery ticket the number of units delivered; he and the driver signed the delivery tickets; the driver took one copy; and the driver departed with the truckload of beer (fols. 103-104, 184-188).

IV

All the witnesses who testified on the subject stated that the delivery of the beer was made at the loading platform of appellant's brewery in Brooklyn (fols. 185-186, 189-190, 198-204, 234, 251, 255, 268-269, 290-291, 312). Its Assistant Controller designated this loading platform as the "point on the premises of The F. & M. Schaefer Brewing Company at which beer is transferred from the possession of The F. & M. Schaefer Brewing Company to the customer or his agent" (fols. 203, 316-317).

V

The distributors picked up the beer in a number of ways. Some used their own vehicles, or vehicles leased to them, and operated by their own employees (fols. 429-433). Others used motor vehicle contract carriers and still others used motor vehicle common carriers (fols. 433-434). The precise amount of sales falling in each of these categories was established at the hearing on the basis of questionnaires which appellant sent to the distributors (fols. 435-440, Txp's Exhs. 39 and 40).

Based on this data, the Comptroller in the final determination eliminated the additional tax on receipts from sales where the distributors used common carriers to pick up the beer (fols. 529-534). This allowance was made in accordance with the last paragraph of Article 209 of the Comptroller's Regulations, quoted at page 23 of the appellant's statement as to jurisdiction.

Thus the final determination treats all appellant's receipts from sales to out-of-state distributors, where the beer was picked up at its brewery in Brooklyn, as fully taxable, except that where such a distributor used a common carrier the receipt is treated as allocable.

ARGUMENT

The challenge to the constitutionality of the New York City General Business and Financial Tax as applied to appellant's receipts from sales to out-of-state distributors, where delivery was taken in the City of New York, does not present a substantial federal question.

This case is indistinguishable from *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941), and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944).

The issue is not novel or unsettled, and the decision of the Court of Appeals of the State of New York is not in conflict with any decision of this Court. In fact it is expressly and wholly based on the aforesaid two decisions of this Court, together with the recent decision in *Indiana Dept. of State Revenue* v. *Bendix Aviation Corp.*, Ind. , 143 N. E. 2d 91 (1957), appeal dismissed 355 U. S. 607 (1958).

I

This Court has established that, for tax purposes, a sale of goods in which delivery is taken by the purchaser within the state of the seller is a local or intrastate transaction, the receipts from which are taxable in full by the state of the seller. The sale is not transformed into an interstate transaction simply because the parties intend that the purchaser will transport the goods out of the state after taking delivery of them or because the purchaser does in fact transport them out of the state. For purposes of a tax on the gross receipts of the seller, such transportation by the purchaser is deemed separate and distinct from the sale.

In *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941), the transactions in question were sales of untreated railroad ties by the Wood Preserving Corporation to the Baltimore and Ohio Railroad Company. The contracts called for the ties to be delivered f. o. b. cars on the purchaser's railroad tracks at loading points in Indiana for transportation to a creosoting plant in Ohio.

The practice was for a representative of the purchaser to inspect and accept the ties at the loading points in Indiana. The seller would then load them upon the purchaser's cars consigned to the purchaser at the Ohio plant. The railroad company (purchaser) then carried the ties to Ohio at its own cost.

The seller, Wood Preserving Corporation, was held to be subject to the Indiana gross income tax on its receipts from these sales, without apportionment of any kind, the Court saying (313 U. S., at p. 68):

> "These were local transactions—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment."

That the parties intended the ties to be transported out of the state immediately upon their sale and delivery to the railroad company appears from the fact that at the time of the sale the railroad company was under contract to deliver the ties so purchased to a plant in Ohio operated by a subsidiary of the seller for creosoting treatment.

International Harvester Co. v. *Department of Treasury*, 322 U. S. 340 (1944), involved sales by Indiana branches of the Harvester Company to purchasers (dealers and users) located outside of Indiana, under contracts calling for the

purchasers to pick up the articles at the Indiana branch. The opinion designates these as "Class D" sales. The tax was disputed on the ground that the purchasers transported the articles out of Indiana immediately upon taking delivery.

In sustaining the Indiana gross income tax on the Harvester Company's receipts from these sales the Court cited and followed the *Wood Preserving* case. It referred to *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (1940), and said (322 U. S., at pp. 345-346):

> "Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. But in each a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce."

The *Harvester* case establishes that such a sale is taxable even though the subsequent removal of the goods from the state by the purchaser is certain (322 U. S., at p. 345). Appellant in the present case contends that the beer it sold was certain to leave the state because the distributors purchasing it had no license to sell it in this state. Essentially the same contention was made and rejected in the *Harvester* case.

Most of the sales involved in this phase of the *Harvester* case were made by Indiana branches to retail dealers who had been assigned specific selling territories outside of Indiana and who were not permitted, under their contracts with the Harvester Company, to make sales in Indiana of Harvester Company products (322 U. S. 340; Record at

pp. 27-30, 32, 45, 55, 58-59, 68-69). The goods purchased by such dealers in Indiana could only be resold outside of Indiana, just as the beer purchased by appellant's distributors could only be resold outside of New York.

The tax in the present case is further sustained by the recent case of *Indiana Department of State Revenue* v. *Bendix Aviation Corp.*, Ind. , 143 N. E. 2d 91 (1957), dismissed for want of a substantial federal question, 355 U. S. 607 (1958). In that case the Indiana gross income tax was held valid as applied to a company's receipts from sales of articles manufactured by it in Indiana, where the articles were delivered to the purchaser's carrier at the taxpayer's Indiana plant, consigned to points outside of the state.

II

The New York Court of Appeals stated that "[in] purpose and in language" the similarity between the Indiana tax, involved in the foregoing cases, and the New York City tax "could hardly be more complete" (4 N. Y. 2d, at p. 428). It noted that the Indiana tax was imposed on "the gross receipts * * * received from trades, businesses, or commerce," whereas the New York City tax is on "all receipts received * * * from * * * trade, business or commercial activity" (*id.*).

The New York Court of Appeals further held that the taxes were not different simply because the New York City tax contains a provision describing it as a tax on "the privilege of carrying on business", particularly since, as it noted (*id.*), this Court, and the Indiana state courts, had described the Indiana tax as "a privilege tax" in *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 345; *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311; and *Miles* v. *Department of Treasury*, 209 Ind. 172, 188, 199 N. E. 372, 379, appeal dismissed 298 U. S. 640.

The appellant, at pages 8-10 of its statement as to jurisdiction, asserts that the New York Court of Appeals in this case adopted a new construction with regard to the nature of the New York City tax. There is no basis for this view. The Court of Appeals simply held that the New York City tax was the same as the Indiana tax in that both are imposed on persons engaged in business in their respective jurisdictions, for the privilege of carrying on business, measured by the gross receipts from such business. There is no ground for differentiating the taxes on the basis of their purpose or terms.

III

The nine cases on which appellant appears principally to rely (statement as to jurisdiction, p. 6) have little pertinency.

Four are tax cases. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (1885); *Kelley* v. *Rhoads*, 188 U. S. 1 (1903); *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69 (1946).

In the *Crew Levick* case a tax on gross receipts was held invalid as applied to receipts of a wholesale merchant from sales to customers in foreign countries, where the goods were "shipped direct by plaintiff in error from its warehouse in Pennsylvania to its customers in the foreign countries" (p. 293). The present plaintiff made no such out-of-state shipments.

In the *Gloucester Ferry* and *Rhoads* cases taxes were held invalid as applied, respectively, to an interstate ferry and to sheep moving in interstate commerce. The factual situations were totally unlike the facts in the present case.

In the *Richfield Oil* case a state tax was held invalid under the Import-Export Clause as applied to a sale of oil for shipment abroad. This Court held that the *Wood Pre-*

serving and *Harvester* cases did not apply because they involved the Commerce Clause, whereas the *Richfield Oil* case involved the Import-Export Clause, and "the limitations of one cannot be read into the other" (329 U. S., at pp. 74-76).

Three of the cases relied on by appellant are state qualification cases. *International Textbook Co.* v. *Pigg*, 217 U. S. 91 (1910); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921); and *Furst* v. *Brewster*, 282 U. S. 493 (1931). Such cases have no application in a tax case since they are "not concerned with the power to tax" [*Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 514 (1923)].

That these cases have no bearing in the present case is borne out by the fact that the *Pigg* and *Dahnke-Walker* cases were unsuccessfully relied on by the taxpayer in the *Wood Preserving case* (313 U. S. 62, Respondent's Brief, pp. 68-77), and that the *Dahnke-Walker* case was cited without success by the taxpayer in the *Harvester* case (322 U. S. 340, Appellant's Brief, pp. 25-27).

One of the remaining two cases relied on by appellant (*Swift & Co.* v. *United States*, 196 U. S. 375 [1905]), involved federal regulation of a stockyard. It was later aligned with *Dahnke-Walker*, and other regulation cases, as inapplicable in tax cases. *Minnesota* v. *Blasius*, 290 U. S. 1, 7-8 (1933).

The ninth case cited by the appellant (*United States* v. *Simpson*, 252 U. S. 465 [1920]), was a decision sustaining the validity of an indictment of an individual under a federal prohibition act for transporting five quarts of whiskey for his own use across state lines. Such a case has no relevancy here.

IV

Appellant's assertion that the tax subjects it to the risk of multiple taxation is groundless. The tax is imposed on

a transaction of sale in which the agreement to sell was made in the City of New York and the delivery also took place there. No jurisdiction outside of the State of New York has the power to impose a similar tax on such a transaction.

The identical contention was made and rejected in *International Harvester Co.* v. *Department of Revenue*, 322 U. S. 340, 348-349 (1944).

CONCLUSION

The appeal to this Court from the order of the Court of Appeals of the State of New York should be dismissed.

December 4, 1958.

Respectfully submitted,

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